United Nations A/C.5/69/10

General Assembly

Distr.: General
29 October 2014

Original: English

Sixty-ninth session
Fifth Committee
Agenda item 144
Administration of justice at the United Nations

Letter dated 29 October 2014 from the President of the General Assembly to the Chair of the Fifth Committee

I have the honour to transmit herewith, a letter from the Chair of the Sixth Committee, Tuvako Nathaniel Manongi, on the administration of justice at the United Nations (see annex).

(*Signed*) Sam K. **Kutesa**

14-63514 (E) 291014

Please recycle

Annex

I have the honour to write to you with regard to agenda item 144, "Administration of justice at the United Nations".

It will be recalled that at its 2nd plenary meeting, on 19 September 2014, the General Assembly, upon the recommendation of the General Committee, referred the agenda item to both the Fifth and Sixth Committees. In paragraph 44 of resolution 68/254, the Assembly invited the Sixth Committee to consider the legal aspects of the report to be submitted by the Secretary-General, without prejudice to the role of the Fifth Committee as the Main Committee entrusted with responsibility for administrative and budgetary matters.

The Sixth Committee considered the item at its 16th plenary meeting, on 21 October 2014, as well as in informal consultations, held on 21, 22, 23 and 24 October. In addition to considering the report of the Secretary-General on the administration of justice at the United Nations (A/69/227), the Committee had before it the report of the Internal Justice Council (A/69/205), which included annexes containing the memorandums submitted by the judges of the United Nations Dispute Tribunal (and of the United Nations Appeals Tribunal) and the report of the Secretary-General on activities of the Office of the United Nations Ombudsman and Mediation Services (A/69/126). I should draw your attention to a number of specific issues related to the legal aspects of those reports, as discussed in the Sixth Committee.

Delegations thanked the Secretary-General for his comprehensive report submitted pursuant to resolution 68/254 and for the facts and figures provided therein on the work of the different parts of the system. Delegations noted with satisfaction how all parts of the system appeared to be functioning and delivering the expected results.

On the issue concerning the privileges and immunities of the judges of the Tribunals (see A/69/227, annex V), delegations supported the proposal by the Secretary-General to clarify, for ease of reference, the scope of the immunities of the judges in the statutes of the Tribunals. Delegations noted, however, that in terms of substance the proposals did not go beyond confirming the legal status quo and did not address any of the concerns expressed by the judges, as outlined in the memorandums of the judges and supported by the Internal Justice Council (see A/69/205). Delegations recalled that the granting of privileges and immunities under international law should follow the functions that the individual working on behalf of the United Nations performs. Since both types of judges undertake the same kind of work for the United Nations it was hard to understand why the immunities enjoyed by the judges of the Dispute Tribunal under section 18 of the General Convention on Privileges and Immunities of the United Nations differed so markedly from those of the judges of the Appeals Tribunal under section 22. It was suggested that some of the differences might result from the fact that the judges of the United Nations Dispute Tribunal — unlike the judges of the United Nations Appeals Tribunal, who performed their official duties for limited periods of time only — worked at their duty stations on a full-time basis, like other Secretariat officials. However, other differentiations, such as the protection against arrest or the inviolability of documents, which under section 22 of the General Convention are granted to judges of the Appeals Tribunal but not to judges of the Dispute Tribunal falling under section 18, seemed to be less evident. Delegations asked whether

better harmonization of the immunities for both groups of judges was indeed legally possible while fully respecting the decision by the General Assembly that any changes concerning the immunities of the judges should not entail a change of their current rank or conditions of service. The Committee thus recommends that a request be made to the Secretary-General to review the issue of harmonization and that a proposal be submitted to the General Assembly when the agenda item is considered next.

Concerning the question of a code of conduct for external legal representatives (see A/69/227, annex VI), delegations thanked the Secretary-General for the draft contained in annex VI. Bearing in mind the purpose of the code, namely, to provide standards of conduct for individuals who act as representatives in proceedings before the Tribunals, delegations questioned the usefulness of a separate code exclusively for legal representatives who were not staff members of the United Nations. Delegations also noted the need to clarify questions concerning the authority to enforce the code, including the relationship between the code and other disciplinary mechanisms that might be applicable. It was emphasized that the standards of appropriate conduct on the part of counsel in a given situation before any of the Tribunals were similar and that it would be difficult for the judge to apply different standards flowing from different legal bases depending on the professional affiliation of the person acting as a legal representative. Delegations recalled that both the judges of the Dispute Tribunal in their memorandum submitted to the sixty-eighth session of the General Assembly (see A/68/306, annex II) and the Internal Justice Council had advocated a single code to cover all types of legal representatives appearing before the Tribunals. It was also recalled that the Sixth Committee, in its letter to the Chair of the Fifth Committee at the sixty-eighth session (A/C.5/68/11) had underlined that, for the sake of clarity and predictability, all individuals acting as legal representatives should be subject to the same standards of professional conduct. Delegations acknowledged, however, that the Assembly, in its resolution 67/241, had requested the Secretary-General to submit a proposal for a code of conduct for external counsel. They nevertheless saw merit in reconsidering the issue with a view to combining in a single text the standards to be followed by staff members acting as legal representatives on the one hand and external legal representatives on the other, while not interfering with other lines of disciplinary authority.

In respect of the proposed amendment concerning the qualifications of judges serving on the Appeals Tribunal (see A/69/227, annex IV), delegations welcomed the proposed changes, which would allow for a wider range of candidates to be attracted and would broaden the professional expertise represented in the Tribunal, as suggested by the Internal Justice Council in its report to the sixty-eighth session (A/68/306). Some delegations wondered, however, whether the proposed text might be too complicated in its practical implementation. Other delegations recalled that at the time of adopting the statute of the Appeals Tribunal, the General Assembly had placed particular emphasis on the need to ensure practical judicial experience. They expressed concern that, in the proposed new version of article 3, the consideration of academic experience might overshadow the consideration of practical judicial experience.

The Committee recommends that the proposed amendment to article 3 (as contained in A/69/227, annex IV) be redrafted, as follows:

3. To be eligible for appointment as a judge, a person shall:

(*a*) Be of high moral character and impartial;

(*b*) Possess at least 15 years of aggregate judicial experience in the field of administrative law, employment law or the equivalent within one or more national or international jurisdictions. Relevant academic experience, when combined with practical experience in arbitration or the equivalent, may be taken into account towards 5 of the qualifying 15 years ~~At least five of the 15 years must be as a judge in a court or tribunal with substantial appellate jurisdiction~~;

(*c*) Be fluent, both orally and in writing, in at least one of the working languages of the Appeals Tribunal. ~~and, on appointment, be in a state of health appropriate for effective service during the entirety of the proposed term of appointment.~~

Delegations welcomed the proposal of the Secretary-General for a mechanism for addressing potential complaints under the code of conduct for the judges of the Tribunals (see A/69/227, annex VII) and expressed their basic agreement with the proposed text. Questions were raised, however, on a number of details. It was pointed out that paragraphs 1 and 5 differed in describing the scope of application of the mechanism. Whereas paragraph 1 referred to allegations regarding "misconduct or incapacity of a judge" in general, paragraph 5 referred to a matter of "incapacity or misconduct in the performance of official duties" and continued to expand the scope of the mechanism by indicating "or, more generally, conduct unbecoming of a judge". It was proposed that the two paragraphs be harmonized and brought in line with the code of conduct. Some delegations saw the need for a provision on the confidentiality and/or any publication of the proceedings, especially in cases where allegations of misconduct turned out to be unfounded. Other delegations expressed concern that the complaints mechanism as proposed in paragraph 7 would also cover violations of the Staff Rules and Regulations, which were promulgated — and could be amended at any time — not by the General Assembly, but by the Secretary-General, as one of the parties to the proceedings. They therefore proposed deleting that part of the paragraph. Some delegations questioned whether there was a need to regulate the conduct of other persons representing the complainant or the judge during the proceedings, referred to in paragraphs 9 and 16 of the draft code. Delegations also supported a proposal to change the title as follows: "Mechanism for addressing complaints regarding alleged misconduct or incapacity of judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal in the performance of their official duties". The Committee recommends that a request be made to the Secretary-General to submit, at its next session, a revised draft that takes into account the proposals made.

The Committee took note of the information provided in the report of the Secretary-General (A/69/227), at the request of the General Assembly, concerning the issue of compensation for moral damages. Delegations recalled the standing practice of the Tribunals and their predecessor, the United Nations Administrative Tribunal, regarding that matter, as reported by the Secretary-General in his report submitted to the Assembly at its sixty-eighth session (A/68/346), as well as the results of the inquiry undertaken by the Secretary-General concerning the practice of other international and national tribunals in that regard (A/68/346). It was noted that the notion of "compensation" as contained in article 10, paragraph 5 (b), of the

statute of the Dispute Tribunal and article 9, paragraph 1 (b), of the statute of the Appeals Tribunal covered a variety of types of harm, but prevented the Tribunals from awarding exemplary or punitive damages (see article 10, para. 7, and article 9, para. 3, respectively). Some delegations expressed concern that in some cases the Tribunals had awarded compensation for moral damages even though there had been no evidence to substantiate such damage, based on the Tribunals finding that an entitlement to compensation arises simply because the Tribunals considered the breach of the staff member's rights to be of a fundamental nature. Those delegations proposed addressing the issue by amending article 10, paragraph 5 (b), of the statute of the Dispute Tribunal and article 9, paragraph 1 (b), of the statute of the Appeals Tribunal as follows:

Statute of the United Nations Dispute Tribunal

Article 10, paragraph 5: "As part of its judgement, the Dispute Tribunal may only order ..."

Article 10, paragraph 5 (b): "Compensation for harm, supported by evidence, ..."

Statute of the United Nations Appeals Tribunal

Article 9, paragraph 1: "The Appeals Tribunal may only order ..."

Article 9, paragraph 1 (b): "Compensation for harm, supported by evidence, ..."

On the issue of the appealability of interlocutory or interim judgements and orders under the provisions of statutes of the Tribunals and the effects of the issue on the operations of the Dispute Tribunal, the Committee took note of the information provided by the Secretary-General and the Internal Justice Council. Delegations thanked the Internal Justice Council for its detailed analysis of the relevant jurisprudence. Some delegations were of the view that the issue would be best addressed through an amendment of the relevant articles of the statutes of both Tribunals, with a view to making clear that, in general, orders share the appealability of judgements, except with regard to case management orders or directives, so as to enable the Tribunals to continue to advance their work without having to wait for an eventual decision of the Appeals Tribunal. Those delegations proposed redrafting article 11.3 and the respective article in the statute of the Appeals Tribunal by inserting, in the first sentence of article 11, paragraph 3, of the statute of the Dispute Tribunal, the words "and orders" after the word "judgements" and to add at the end of the paragraph a sentence reading "Case management orders or directives shall be executable immediately".

Concerning the proposal of the Secretary-General to extend the mandate of the ad litem judges until December 2015, delegations acknowledged that the extension of the positions of three ad litem judges — which would keep the number of full-time judges working on the current caseload of the Dispute Tribunal to six — was a necessary temporary measure aimed at ensuring the continued delivery of justice. Referring to an earlier report of the Internal Justice Council (A/67/98) and the previous consideration of the issue by the Sixth Committee in 2012 (see A/C.5/67/9), delegations reiterated their concern about the legal aspects of the situation and emphasized the need to find a long-term solution to the question of the composition

of the Dispute Tribunal that would ensure the sustained efficiency of the formal system's performance. The Committee recommends that the issue be covered by the envisaged interim assessment, which, as proposed by the Secretary-General, would also address systemic issues for the operation of the system of administration of justice and resource requirements.

The Sixth Committee took note of the information provided by the Secretary-General, at the request of the General Assembly, in his report on the activities of the Office of the United Nations Ombudsman and Mediation Services (A/69/126) regarding the handling of complaints by non-staff personnel and welcomed the particular interest expressed in the issue by the Advisory Committee on Administrative and Budgetary Questions. Delegations recalled that the Sixth Committee had repeatedly highlighted that the United Nations should ensure that effective remedies were available to all categories of United Nations personnel and had recommended that the question be addressed in the envisaged interim assessment. In that context, delegations also recalled that the General Assembly had requested the Secretary-General to promulgate the revised terms of reference for the Office of the United Nations Ombudsman and Mediation Services, after full consultation, as soon as possible.

Concerning the terms of reference for the interim assessment, the Sixth Committee requested that the list of documents to be considered by the independent experts (see A/69/227, annex II, para. 1 (d)) be amended to contain also the results of the deliberations of the Sixth Committee on the legal aspects of the agenda item entitled "Administration of justice at the United Nations", as mandated by the General Assembly and contained in the letters of the Chair of the Sixth Committee to the President of the General Assembly.

Delegations noted with concern the difficulties caused for the system of administration of justice by self-represented applicants, as reported by the Tribunals and the Secretary-General. The Committee welcomed all efforts reported by the different parts of the system of administration of justice to inform staff about available sources of legal and other advice and about the possibilities to secure representation in the system. Delegations also urged the Secretariat to continue to provide information on the role and functioning of the various parts of the system and the possibilities it offered to address work-related complaints. The Committee encouraged all parties to a work-related dispute to make all efforts to settle it early on in the informal system, without prejudice to the right of each staff member to submit a complaint also for review in the formal system.

The Committee noted with appreciation the information concerning recent and ongoing improvements of the search engine of the Tribunals. Full and accurate availability of, and easy access to, the jurisprudence of the Tribunals had an important legal dimension since it allowed staff and management, as well as anyone acting as a legal representative, to inform themselves about the latest developments of the jurisprudence, to establish precedents that could guide the assessment of other cases and to better understand relevant rules and regulations as applied by the Tribunals.

The Committee recommended that the General Assembly include the item entitled "Administration of justice at the United Nations" in the provisional agenda of its seventieth session.

It would be appreciated if the present letter could be brought to the attention of the Chair of the Fifth Committee and be circulated as a document of the General Assembly, under agenda item 144, "Administration of justice at the United Nations".

(*Signed*) Tuvako Nathaniel **Manongi**
Chair of the Sixth Committee at the sixty-ninth
session of the General Assembly